(12) (5)

Supreme Court U.S.
FILED

JAN 15 2003

OFFICE OF THE CLERK

Nos. 02-241 & 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, ET AL.,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE CENTER FOR NEW BLACK LEADERSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CLINT BOLICK
Counsel of Record
WILLIAM H. MELLOR
RICHARD D. KOMER
INSTITUTE FOR JUSTICE
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 955-1300

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OR CALL COLLECT (402) 342-2831

22 pp

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INTEREST OF *AMICUS CURIAE*[1]

The Center for New Black Leadership (CNBL) is a non-partisan, not-for-profit, public policy research and advocacy organization devoted to developing and promoting a market-oriented, community-based vision of public leadership for black communities in America and abroad.

SUMMARY OF ARGUMENT

"Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 291 (1978) (Opinion of Powell, J.). Respondents are only the latest among legions who have tried to persuade this Court to abandon that bedrock principle of equal protection, this time in service of the amorphous concept of "diversity." To accept racial diversity as a compelling governmental interest would create an exception that would swallow the constitutional rule of nondiscrimination.

In reality, the massive racial preferences employed by respondents are a superficial and self-defeating response to a serious national problem that lurks just beneath the surface of this litigation: a chronic and debilitating academic gap, which manifests itself in severe racial disparities in

[1] The parties have consented to the filing of this brief. In conformity with Supreme Court Rule 37.6, *amicus* states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

admissions at elite institutions of higher learning. Racial preferences do nothing to close that academic gap. To the extent that respondents' policies are directed toward any legitimate purpose, race-neutral methods exist to try to accomplish it. To close the academic gap requires efforts far more systemic than those presently employed by respondents or most other governmental entities. Not until this nation and this Court eschew the illusory quick-fix of racial preferences, once and for all, will America make true progress toward the ideal of racial equality and equal educational opportunities.

ARGUMENT

All parties appear to agree that the constitutional standard applicable to all racial classifications created by government[2] is strict scrutiny, requiring the state to demonstrate a compelling governmental interest served by the most narrowly tailored means. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The challenged racial preferences do not satisfy either requirement.

I. RACIAL DIVERSITY IS NOT A COMPELLING GOVERNMENT INTEREST.

As Justice Robert Jackson warned presciently in *Korematsu v. United States*, 323 U.S. 214, 246 (1944)

[2] Because this case is governed by the 14th Amendment, which limits state action only, *amicus* expresses no view on the proper legal standards applicable to private entities.

(Jackson, J., dissenting), once the Court has "validated the principle of racial discrimination," the "principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Many have done so, from the apologists for segregation to the advocates of racial preferences, the latter employing soothing terms such as "affirmative action," "role models," and "benign discrimination." Respondents here employ the latest euphemism – diversity – and the Court should reject it along with other forms of discriminatory subterfuge.

"Diversity" is a clever and slippery term. Respondents insist that what they really mean is "viewpoint diversity." See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002). Of course, a university properly may seek to ensure diversity of viewpoints in its student body.[3] However, such an effort must be undertaken on an individualized basis. The fact that such individual determinations may present administrative inconvenience provides no justification for racial preferences. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989). Respondents here have undertaken no such individualized determinations, opting instead for racial stereotyping.

This Court repeatedly and categorically has rejected the use of racial stereotypes as a proxy for viewpoint

[3] Another problem with viewpoint diversity as a justification here is that it would seem equally valid for a university to assign a high value to viewpoint homogeneity. Racial preferences presumably would yield very different results in the two contexts; but if one is a compelling justification for racial preferences, so too would be the other.

diversity. As the Court declared in the context of political reapportionment in *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (citations omitted), such actions bear

> an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

Moreover, the diversity concept is simply too amorphous a basis upon which to hitch the use of racial classifications, which, if ever appropriate must be used with surgical precision. Justice Powell, whose wisdom was not limited to the *Bakke* case, spoke to the context of "role models," an equally amorphous rationalization for racial preferences rejected by this Court in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality). He observed that such a rationale has "no logical stopping point," *id.* at 275, and that its adoption would allow a court to "uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276. Diversity likewise is inherently subjective and elastic. Who is to say what constitutes diversity? Or when it is achieved?[4] Accepting diversity as a compelling governmental objective

[4] Indeed, respondents could not specify with particularity any point at which a "critical mass" of diversity was achieved. *Grutter*, 137 F. Supp. 2d at 850.

necessarily would amount to an open-ended license for racial preferences.

But in any case, the stated goal of viewpoint diversity here plainly is pretextual. Respondents have singled out specific racial and ethnic groups for preference, in an effort to achieve a "critical mass" of such groups. *Grutter*, 137 F. Supp. 2d at 832. Hence respondents' true goal is racial balance, which this Court again repeatedly and categorically has rejected as a legitimate governmental objective, much less a compelling one. "Racial balance is not to be achieved for its own sake." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). See also *Croson*, 488 U.S. at 507; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971) ("If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse"). See also Martin D. Carcieri, "The Sixth Circuit and *Grutter v. Bollinger*: Diversity and Distortion," 7 *Tex. Rev. of Law & Politics* 127 (2002).

Respondents assert that the preferences invoke race as merely "a factor" rather than as a rigid quota. No majority opinion of this Court ever has turned upon such an empty semantical distinction. Contrasting a quota with "critical mass" – amounting to between 11 and 17 percent of specified minority groups, *Grutter*, 137 F. Supp. 2d at 850 – is a distinction without a difference. And the preferences needed to achieve those numbers are massive. *Grutter*, 137 F. Supp. 2d at 837 and n.20; *Grutter*, 288 F.3d at 776 (Boggs, J., dissenting) ("staggering magnitude"). At the University of Michigan, applicants automatically are awarded 20 points out of a possible 150 if they belong to specified racial or ethnic groups. *Gratz v. Bollinger*, 122

F. Supp. 2d 811, 827 (E.D. Mich. 2000). The difference between the racial preferences employed by respondents and the quota rejected in *Bakke* is one of the slightest degree. The effect is exactly the same. See *Grutter*, 137 F. Supp. 2d at 851 ("the law school has made the current admissions policy practically indistinguishable from a quota system").

Nor would the result differ if the preference were more slight. Restricting race to *a* factor in the admissions process creates no real or principled limitation. Race presumably never would be the sole factor in an admissions decision, but considering the competitiveness of the admissions process, it likely often will be determinative, see *Grutter*, 137 F. Supp. 2d at 834, given the tragically small number of black and Hispanic students who meet the requisite standards for admission to elite postsecondary institutions. But in any case, weak or strong preferences are not the issue. Both involve double standards based on racial classifications. In any situation where opportunities are finite, allowing race to be a plus-factor for one person necessarily means that it is a minus-factor for someone else.[5] We urge the Court to reject the siren call of seemingly modest departures from the principle of

[5] Racial preferences invariably pit minority racial groups against one another. In the university context, black and Hispanic students are targeted for preferences, while Asian students suffer disproportionate disadvantage. Moreover, in our increasingly multi-ethnic society, bi-racial individuals often are forced to choose which group they belong to in order to determine their rights and opportunities.

equality, lest the discriminatory exception become the rule.[6]

II. RACIAL DISPARITIES IN HIGHER EDUCATION ARE THE RESULT OF A SEVERE AND PERSISTENT ACADEMIC GAP THAT RACIAL PREFERENCES CANNOT CURE.

No matter how slight, when governmental classifications "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke*, 438 U.S. at 299 (Opinion of Powell, J.). The narrow tailoring inquiry encompasses whether less-restrictive means could have been used and whether the classification at issue "fits" with greater precision than any alternative means. *Wygant*, 476 U.S. at 279 n.6; *Croson*, 488 U.S. at 507.

[6] The Court's disdain for racial classifications, even as a remedy for past discrimination, is echoed by a strong popular consensus. A spring 2001 survey by the *Washington Post*, Kaiser Foundation, and Harvard University found that when asked whether race or ethnicity should be a factor in hiring, promotion, or college admission, or whether merit and qualifications should be the sole criterion, only five percent of respondents said race or ethnicity should be a factor, while 92 percent favored merit alone. Among African-Americans, 12 percent opined that race or ethnicity should be a factor, while 86 percent favored merit and qualifications. Those findings are supported by numerous other highly credible surveys in recent years. One, for instance, found that 90 percent of black respondents opposed even favoring black students whose SAT scores are 25 points below white applicants (when, in fact, minority SAT scores typically average 150-200 points less than non-minority scores). See Stuart Taylor Jr., "Do African-Americans Really Want Racial Preferences?" *National Journal* (Dec. 20, 2002).

Assuming respondents are addressing any legitimate goal, racial preferences are a crude and overly burdensome means to satisfy it in light of racially neutral alternatives. Moreover, such racial sorting glosses over the real cause of racial disparities in postsecondary education: a severe racial gap in academic achievement in the K-12 years, owing significantly to the concentration of economically disadvantaged black and Hispanic students in defective inner-city public schools. Racial preferences do nothing to close that gap.

The racial gap is so severe that in order for elite institutions of higher learning to obtain anything approaching a racially proportionate (i.e., "diverse") student body, they must do one of the following: (1) engage in massive racial preferences, as here; (2) abandon objective admissions criteria in an effort to racially gerrymander their student bodies; or (3) help to address systemically the underlying problems in our nation's K-12 educational system. The easiest approach, exemplified in this case, is the first, and it appears widespread among elite postsecondary institutions. Once public universities are prevented from employing overt racial preferences, they move to the second approach. The third approach, of course, is the hardest, but it is the only real solution to the academic gap. Not until the tool of racial preferences is removed from the policy arsenal can we make real progress toward closing the educational divide.

A. All of respondents' rationalizations for the use of racial preferences avoid the real and glaring issue: an educational crisis among disadvantaged members of certain racial and ethnic groups, including blacks and Hispanics. However disguised, respondents' efforts are a superficial and cosmetic response to this crisis that leaves intact and unaddressed the underlying problems in our K-12

educational system that lead to severe racial disparities in postsecondary education.

Following this Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and the adoption of our nation's civil rights laws, blacks and other minorities made substantial economic and educational progress. See generally Thernstrom and Thernstrom, *America in Black and White* (1997). Unfortunately, a substantial academic gap has persisted, and since the late 1980s actually has widened. The academic gap starts in the early years and continues to grow. The 2000 National Assessment of Educational Progress (NAEP) revealed, for instance, that 63 percent of black and 56 percent of Hispanic fourth-graders are below the most basic levels of proficiency in reading. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* at 31 and 33. By the time students turn 17, the racial gap is severe. In reading, the average black 17-year-old is roughly four academic years behind the average white student in reading.[7] The racial gap in mathematics is 3.4 years; in writing it is 3.3 years; in science it is 5.4 years. Thernstrom and Thernstrom at 355. When it comes time for those youngsters to apply for college, black students are at a severe disadvantage.

The achievement gap reflects as well in Scholastic Achievement Test results. In 1995, the average white score on the verbal component of the SATs was 448, compared to

[7] In other words, if the average white student is reading at 12th grade proficiency, the average black student is reading at only an eighth grade level.

356 for blacks. The average mathematics score for whites was 498, while for blacks it was 388. Thernstrom and Thernstrom at 398. The gap was especially pronounced at the upper end of SAT scores, which is most relevant, of course, to elite institutions of higher education. In 1995, among students scoring between 700 to 800 on the verbal component of the SAT, 8,978 were whites, 1,476 were Asians, and only 184 nationwide were black. Among students scoring 750 or above on the mathematics component, 9,519 were white, 3,827 were Asian, and only 107 were black. In other words, the ratio of whites to blacks in the elite verbal category was 49:1; in mathematics it was 89:1. By another measure, among the 734 superstar students named in 1995 by the College Board as Advanced Placement Scholars, which reflects top grades on eight AP tests, 29.7 percent were Asians, 63.1 percent were non-Hispanic whites, and only two of 734 were African-Americans. *Id.* at 398-400. Measuring by grade-point averages yields similar results: in 1995, only 12 percent of black college-bound seniors were in the top ten percent of their class, compared to 23 percent of whites and 28 percent of Asians. *Id.* at 402.

The academic gap translates into a huge competitive disadvantage in college admissions, particularly at elite institutions. In terms of required academic credentials for admission to the University of California, in 1996 30 percent of the state's Asian-American students and 12.7 percent of whites qualified, compared to only 3.8 percent of black and 2.8 percent of Latino students. James Traub, "The Class of Prop. 209," *New York Times* (May 2, 1999), sec. 6 at 44.

Not only do most black and Hispanic students operate at a huge academic disadvantage when they apply to college, but a disproportionate number of them drop out before they do so. The national graduation rate for the public school class of 2000 was 69 percent; for black students it was 55 percent, and for Hispanic students only 53 percent. Green and Winters, *Public School Graduation Rates in the United States* (2002) at 3.

This enormous academic gap manifests itself, of course, in large racial disparities in postsecondary institutions, especially elite schools, which have resorted to racial preferences in order to alter the demographic composition of the student bodies that would result from objective admissions criteria. See, e.g., Paul Brest, "Diversity Gives Depth to the Law," *Los Angeles Times* (Jan. 3, 2003) (former Stanford Law School dean reports that "[f]or well over a quarter of a century, law schools have been taking race into account in their admission of students in order to promote diversity"). However, since the late 1980s, *the racial academic gap has actually widened*. Thernstrom and Thernstrom at 357 and 397. Racial preferences do not purport to do anything to close the racial academic gap. Indeed, they exacerbate the problem by creating the cosmetic illusion of progress, when in reality the underlying problems are festering unaddressed. See Bolick, *The Affirmative Action Fraud* (1996). The use of racial preferences by respondents and other elite institutions of higher learning not only is not narrowly tailored to the goal of increasing the number of qualified minority students, it operates at cross-purposes with that goal.

B. In the aftermath of voter initiatives curbing racial preferences in public university admissions in California and Washington State and by court decision in Texas,[8] the number of black and Hispanic students at the most elite public universities declined substantially.[9] Faced with declining minority enrollment in their elite institutions of higher learning, those states all adopted racially neutral programs designed to boost minority enrollment. Even if this Court were to recognize racial diversity as a compelling governmental interest, *the existence of such facially neutral programs establishes, as a matter of law, that less-burdensome alternatives exist to the use of racial preferences*,

[8] By executive order of the governor, Florida also ceased the overt use of racial preferences in public university admissions.

[9] The number of students in the public university systems as a whole, however, did not significantly decline. That is because of a phenomenon called "cascading": instead of being leap-frogged by racial preferences into elite institutions, minority candidates with lesser credentials are admitted to universities commensurate with their objective qualifications. For instance, while the number of blacks and Hispanics enrolled at the University of California's Berkeley and Los Angeles campuses declined from 1997 to 1999 after the eradication of racial preferences, they increased by half or more at the Riverside and Irvine campuses. See Adam Cohen, "When the Field is Level," *Time* (July 5, 1999) at 30; Traub at 44. Cascading may ultimately result in higher minority graduation rates from college. Although minority graduation rates from the most elite institutions of higher learning are high, even proponents of racial preferences, such as Derek Bok, former president of Harvard, acknowledge that black and Hispanic students at elite institutions rank academically on average in the bottom one-quarter to one-third of their classes. Traub at 44. In post-secondary education generally, dropout rates for minority students are substantially higher than for nonminority students, suggesting that the academic mis-match created by massive racial preferences may be detrimental to many of the intended beneficiaries. Thernstrom and Thernstrom at 405-09.

necessarily rendering respondents' programs unconstitutional.

Each of the programs guarantees admission to state universities to a specified percentage of top graduates from the state's high schools. In California, the top four percent of high school graduates who can produce evidence of disadvantage are guaranteed admission, which has resulted in minority enrollment in the system as a whole approaching the same level as before the eradication of preferences. See Maria Sacchetti and Susan Tully Tapia, "UCI Leads System in Key Ethnic Increases," *Orange County Register* (Apr. 4, 2001). Texas provides guaranteed admission to the top ten percent. See Jim Yardley, "Desperately Seeking Diversity," *New York Times* (Apr. 14, 2002), sec. 4A at 28. In Florida, where minority enrollment has remained constant since the elimination of racial preferences, admission is guaranteed for the top 20 percent. "Governor's One Florida Plan Works," *Fort Myers (FL) News-Press* (June 21, 2002) at 8B.

These so-called "percent" programs were designed primarily to maintain minority enrollment within university systems, and to that extent they have succeeded. However, given the racial academic gap, it is plain that these programs are gerrymandered to achieve, without overt preferences, a particular racial and ethnic result. As a result, they are constitutionally suspect. See, e.g., *Village of Arlington Heights v. Metro. Hous. Devel. Corp.*, 429 U.S. 252 (1977). Moreover, such programs also do little if anything to redress the academic gap that fuels racial disparities in higher education.

C. Fortunately, the elimination of racial preferences has had the salutary effect of encouraging activists and

policymakers to look at, and begin addressing, the systemic causes of racial disparities. As *Time* Magazine observes, "The low number of minorities at top-tier campuses should be a wake-up call about the need to improve K-12 education for all children." Cohen at 30. Specifically, as the *New York Times* has found, "ending affirmative action has had one unpublicized and profoundly desirable consequence: it has forced the universit[ies] to try to expand the pool of eligible minority students." Traub at 44.

To that end, university admissions offices themselves may be able to do little to boost minority enrollment. This Court properly has recognized that isolated agencies of government are ill-equipped to solve broad social problems, underscoring why it is especially dangerous to give such entities "license to create a patchwork of racial preferences." *Croson*, 488 U.S. at 499. Certainly an admissions office may shift to individualized admissions procedures, to take into account individual talents or hardships, or eliminate alumni preferences or other non-merit-based barriers to admission. *Id.* at 508; *Grutter*, 137 F. Supp. 2d. at 871. Schools including Berkeley are doing exactly that. Traub at 44.

Beyond their admissions offices, universities can, and are beginning to, assist in redressing underlying educational disparities. Forced to abandon the easy fix of racial preferences, the University of California adopted the "Berkeley Pledge," which encompasses efforts to help educationally disadvantaged students to build their skills and credentials for college admission. College students and professors are enlisted for both mentoring and tutoring of students well before they apply for college admission. Michael Scott Moore, "Affirmative Reaction," *SF Weekly* (Nov. 12, 1997). As the *New York Times* reports,

"U.C. campuses are now reaching down into the high schools, the junior highs and even the elementary schools to help minority students achieve the kind of academic record that will make them eligible for admission, thus raising the possibility that diversity without preferences will someday prove to be more than a fond hope." Traub at 44.

Likewise, Florida Lieutenant Governor Frank Brogan comments, "There are things we can do to get our minority numbers up quickly and we're working hard on that, but what we're really interested in is the long haul." Among other efforts, the state has partnered with the College Board to increase the number of students taking advanced placement exams and the PSAT, offering all public school tenth-graders the chance to take the PSAT for free. The University of Florida also is working with inner-city high schools to boost academic achievement. Karla Schuster, "Education Initiative is Praised," *Ft. Lauderdale (FL) Sun-Sentinel* (March 6, 2002) at 5B. Similarly, the University of Washington is engaged in academic and mentoring programs in inner-city schools in an effort to better prepare middle and high school students to be more competitive in college admissions. Ruth Schubert, "UW Sees Decline in Minority Freshmen," *Seattle Post-Intelligencer* (May 8, 1999) at A1. The programs seem to hold promise. In Washington State, for instance, middle school students participating in an Early Scholars Outreach Program have produced a 3.2 grade-point average, compared with 2.5 for non-participating students. Rebecca McCarthy, "UGA Revises Entry Rules," *Atlanta Journal-Constitution* (Aug. 1, 2002).

Going even more to the heart of the problem, school choice programs such as charter schools and vouchers offer

real hope for narrowing the racial academic gap. See Howell and Peterson, *The Education Gap: Vouchers and Urban Schools* (2002); Bolick, *Transformation* (1998) at 34-67. In Milwaukee, after four years with a school voucher program, the academic gap was reduced by between one-third and one-half. Paul E. Peterson, "School Choice: A Report Card," in Peterson and Hassel, eds., *Learning from School Choice* (1998) at 23. Studies indicate that public school performance improves when competition is introduced. See, e.g., Nina Shokraii Rees, "Public School Benefits of Private School Choice," *Pol'y Rev.* (Jan.-Feb. 1999). After the first year of the Florida Opportunity Scholarship Program, every public school listed by the state as failing (and thereby qualifying its students for vouchers) had improved its academic performance, with gains most pronounced among the poorest-performing youngsters. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (2001). Of course, the Court approved such programs only last year in *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002).

A wide variety of truly race-neutral efforts are available to policymakers to expand educational opportunities and lift academic performance among disadvantaged children. See *Grutter*, 288 F.3d at 807-08 (Boggs, J., dissenting). Such efforts will be pursued and real progress will resume in earnest only when the superficial and divisive approach of racial preferences is removed, fully and without equivocation, from the policy arsenal.

Defenders of racial preferences in postsecondary education contend that race-neutral admissions are "unworthy of our country's ideals." Bowen and Bok, *The Shape of the River* (1998) at 286. Surely they are wrong about that; but they are right that the practice of sorting

Americans by race is deeply embedded in our history. The time has long come to stop it. Surely, the "civil rights warriors of the 1950s and 1960s did not put their lives on the line to perpetuate such terrible habits of mind." Stephan Thernstrom and Abigail Thernstrom, "Reflections on *The Shape of the River*," 46 UCLA L. Rev. 1583, 1628 (1999).

The invisible victims of racial preferences are those who are left behind, their plight swept under the carpet by the cosmetic illusion of racial proportionality. Civil rights do not trickle down. We respectfully urge this honorable Court to reaffirm the principle of equality and thereby to help this nation continue along the path of racial healing and make good at last on the promise of opportunity.

CONCLUSION

Amicus urges this honorable Court to reverse the decisions below.

Respectfully submitted,

CLINT BOLICK
Counsel of Record
WILLIAM H. MELLOR
RICHARD D. KOMER
INSTITUTE FOR JUSTICE
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 955-1300

January 15, 2003

Counsel for Amicus Curiae
Center for New Black Leadership